

1 Ara Sahelian, Esq., [CBN 169257]  
2 SAHELIAN LAW OFFICES  
23276 South Pointe Drive, Suite 216  
3 Laguna Hills, CA 92653  
4 949. 859. 9200  
5 e-mail: sahelianlaw@me.com  
6 Attorneys for Fogo De Chao Churrascaria (San Jose) LLC  
7

8 **UNITED STATES DISTRICT COURT**  
9 **CALIFORNIA NORTHERN DISTRICT**  
10 **(San Jose Courthouse)**

11  
12  
13  
14  
15 Scott Johnson,  
16 Plaintiff,  
17 vs.  
18 Fogo De Chao Churrascaria (San  
19 Jose) LLC  
20 Defendant.

CASE NO.: 5:21-cv-02859-BLF  
The Honorable Beth Labson Freeman

**REPLY BRIEF TO MOTION TO  
DISMISS**

Hearing Date: 9/30/21  
Time: 9:00 AM

**REPLY BRIEF TO MOTION TO DISMISS [FRCP 12(b)1]**

**THE PARTIES CONFERRED PRIOR TO THE FILING OF  
THIS MOTION**

Plaintiff's attorney, Ray Ballister, and Defendant's attorney met and conferred via telephone on May 13, 2021. The issues before the Court, here, are recurring with respect to the firms representing the Plaintiff and Defendant. In fact, Potter Handy and the undersigned have been on opposite sides on this issue in *Whitaker v Body, Art, and Soul Tattoos L.A., LLC*, 2021 U.S. App. LEXIS 1991 (9th. Cir. 2021).

**I. POTTER HANDY WAS ADMONISHED BY THE NINTH  
CIRCUIT TO AVOID DRAFTING COMPLAINTS OF THE SORT  
FILED HERE**

In 2020, the Potter Handy firm was also admonished by the Ninth Circuit for failing to provide factual allegations, putting a defendant on notice of the claims. (See *Whitaker v. Panama Joe's*, 2:19-cv-09676-DSF-SS, Central District of California). It seems as if Potter Handy is tone-deaf in that it has filed, here, the identical complaint. The operative factual allegations in the within case are no different than those found in *Panama Joe's*.

Comparing the allegations of made in *Panama Joe's* ("Panama") and the initial complaint in the within matter

Panama: "Plaintiff went to Panama Joe's in October 2019 with the intention to avail himself of its goods, motivated in part to determine if the defendants comply with the disability access laws." Complaint ¶ 8.

1           Here: “Plaintiff went to the Restaurant in September 2020 and  
 2 November 2020 with the intention to avail himself of their goods or  
 3 services motivated in part to determine if the defendants comply with  
 4 the disability access laws.” Complaint ¶ 8.

5           Panama: “Panama Joe’s is a facility open to the public, a place of  
 6 public accommodation, and a business establishment.” *Id*, ¶ 9.

7           Here: “The Restaurant is a facility open to the public, a place of  
 8 public accommodation, and a business establishment.” *Id*, ¶ 9.  
 9

10          Panama: “Unfortunately, on the date of the plaintiff’s visit, the  
 11 defendants failed to provide accessible dining surfaces.” *Id*, ¶ 10.

12          Here: “Unfortunately, on the dates of the plaintiff’s visits, the  
 13 defendants failed to provide wheelchair accessible dining surfaces in  
 14 conformance with the ADA Standards as it relates to wheelchair users  
 15 like the plaintiff.” *Id*, ¶ 10.  
 16

17          Panama: “On information and belief, the defendants currently  
 18 fail to provide accessible dining surfaces.” *Id*, ¶ 11.

19          Here: “On information and belief, the defendants currently fail to  
 20 provide wheelchair accessible dining surfaces.” *Id*, ¶ 14.

21          Panama: “Plaintiff personally encountered these barriers.”  
 22 Complaint ¶ 12

23          Here: “These barriers relate to and impact the plaintiff’s  
 24 disability. Plaintiff personally encountered these barriers.” *Id*, ¶ 15.

25          Panama: “By failing to provide accessible facilities, the  
 26 defendants denied the plaintiff full and equal access.” *Id*, ¶ 13.  
 27  
 28

1           Here: “As a wheelchair user, the plaintiff benefits from and is  
2 entitled to use wheelchair accessible facilities. By failing to provide  
3 accessible facilities, the defendants denied the plaintiff full and equal  
4 access.” *Id.*, ¶ 16.

5           Panama: “The failure to provide accessible facilities created  
6 difficulty and discomfort for the Plaintiff.” *Id.*, ¶ 14.

7           Here: “The failure to provide accessible facilities created  
8 difficulty and discomfort for the Plaintiff.” *Id.*, ¶ 17.

9           Panama: “The defendants have failed to maintain in working and  
10 useable conditions those features required to provide ready access to  
11 persons with disabilities.” *Id.*, ¶ 17.

12           Here: “The defendants have failed to maintain in working and  
13 useable conditions those features required to provide ready access to  
14 persons with disabilities.” *Id.*, ¶ 18.

15           Panama: “Plaintiff will return to Panama Joe’s to avail himself  
16 of its goods and to determine compliance with the disability access  
17 laws once it is represented to him that Panama Joe’s and its facilities  
18 are accessible. Plaintiff is currently deterred from doing so because of  
19 his knowledge of the existing barriers and his uncertainty about the  
20 existence of yet other barriers on the site. If the barriers are not  
21 removed, the plaintiff will face unlawful and discriminatory barriers  
22 again.” *Id.*, ¶ 19.

23           Here: “Plaintiff will return to the Restaurant to avail himself of  
24 its goods or services and to determine compliance with the disability  
25  
26  
27  
28

1 access laws once it is represented to him that the Restaurant and its  
 2 facilities are accessible. Plaintiff is currently deterred from doing so  
 3 because of his knowledge of the existing barriers and his uncertainty  
 4 about the existence of yet other barriers on the site. If the barriers are  
 5 not removed, the plaintiff will face unlawful and discriminatory  
 6 barriers again.” *Id.*, ¶ 20.

7  
 8 The above refers to the original Complaint. The First Amended  
 9 Complaint, as it stands, is also incomprehensible in that it requires discovery  
 10 for an understanding as for what Mr. Johnson needs to be able to dine at the  
 11 restaurant.

12 **II. THE COMPLAINT IS FACTUALLY LACKING, AND**  
 13 **REQUIRES DISCOVERY FOR IT TO MAKE SENSE**

14 As a threshold matter, the existing tables are fully accessible. (see  
 15 moving papers pages 2, 3, 11 and Exhibits B, C, D, F, G)

16 The Ninth Circuit in *Panama Joe’s* clarified that no defendant in an  
 17 ADA suit should have to conduct discovery in order to comprehend the  
 18 allegations made in a complaint.

19  
 20 “A complaint must contain sufficient allegations of underlying facts to  
 21 give fair notice and allow the opposing party to defend itself, and it must  
 22 “plausibly suggest an entitlement to relief, such that it is not unfair to require  
 23 the opposing party to be subjected to the expense of discovery and continued  
 24 litigation.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).” *Whitaker v.*  
 25 *Pan. Joes Inv’rs LLC*, 2021 U.S. App. LEXIS 1985, \*5. The allegations made  
 26 in the FAC do not explain Mr. Johnson’s needs as to the clearance he  
 27 requires, below a dining surface, to be able to dine in his wheelchair,  
 28

1           “Plaintiff desired to eat outside because he enjoys the views and patio  
 2 dining experience. The tables had a pedestal style support that did not provide  
 3 enough knee and/or toe clearance. Without this clearance, it is difficult for  
 4 plaintiff to pull under the table. This means that plaintiff has to sit relatively  
 5 far from the table making dining difficult. Plaintiff risks spilling his food,  
 6 which is embarrassing and frustrating.”  
 7

8           It’s worth noting here that there is no view or patio experience as the  
 9 entire outdoor dining area was enclosed (see Exhibits page 4). The allegation  
 10 that the tables “had a pedestal style support that did not provide enough knee  
 11 and/or toe clearance” is utterly meaningless. For instance:

12                       What are the dimensions of Mr. Johnson’s wheelchair?

13                       What is the amount of clearance that he requires below a dining  
 14 surface (length, width)?

15                       Did he attempt to use any of the tables, and what were his  
 16 findings?  
 17

18                       Did he actually go into the outdoor dining area and ask to be  
 19 seated at an accessible table?

20                       How does he actually conclude that no accessible tables were  
 21 available?

22           Potter Handy files about 3,000 - 4,000 complaints annually. Mr.  
 23 Johnson, an attorney himself, has filed over 4,000. Here, they’ve each defied  
 24 the 9th Circuit’s mandate by continuing to file complaints that lack the factual  
 25 allegations sufficient to put a defendant on notice of the claims.  
 26

27           The First Amended Complaint fails to satisfy the *Iqbal/Twombly* standard.  
 28

1 Potter Handy and Mr. Johnson should not be rewarded for their malfeasance  
2 by a leave to amend FAC complaint.  
3

4 Respectfully submitted:

5 Date: 6/23/2021  
6

7 SAHELIAN LAW OFFICES

8   
9  
10 Ara Sahelian, Esq.  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28